IN THE SUPREME COURT OF FLORIDA
CASE NO. SC14-2347

LENNART S. KOO,
Petitioner,

v.

L.T. Nos.: 1D12-4866
2012-CF-1462

STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

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I. A NEW TRIAL IS REQUIRED BY THE POST-TRIAL RECANTATION OR, IN THE ALTERNATIVE, AN EVIDENTIARY HEARING ON THE AMENDED MOTION FOR NEW TRIAL

In his amended motion for new trial, Koo explicitly insisted that the letter satisfied the standard under controlling law on newly discovered evidence to require an evidentiary hearing. (R. I. 80-81, ¶¶9, 14). The trial court's order denying the motion for new trial recognized that the court was denying an evidentiary hearing, having "reviewed the letter from Dr. Saleh and find[ing] that his testimony, *should it be* consistent with [the] content of his letter," would fall short of satisfying the standard for newly discovered evidence. (R. I. 98) (emphasis added). However, the trial court failed to allow a hearing to determine what Saleh's actual testimony would be and to assess the credibility of his actual testimony at that time. The trial court also predicated its denial on the fact that the jury found Koo guilty despite having heard evidence that Koo "had access to all of Dr. Saleh's keys," (R. I. 99), but the jury heard that only from Koo, and Saleh testified to the contrary at trial but admitted to the truth of Koo's testimony in his post-trial letter.

Saleh admitted in the letter that he had been acting out frighteningly, contrary to his trial testimony and consistent with Koo's testimony, relevant to

Koo's state of mind and intent. (R. I. 113). The letter also admitted something else Saleh denied at trial, that Koo worked for him on an ongoing basis, not merely off and on, (R. I. 113), corroborating Koo's previously uncorroborated trial testimony relevant to Koo's authority and license to enter Saleh's properties. Evidence such as this satisfies the requirement of a probability of acquittal on retrial because "it weakens the case against a defendant so as to give rise to a reasonable doubt as to his or her culpability." *Brooks v. State*, ___ So. 3d ___, ___, 2015 W.L. 2095808, *21 (Fla. May 7, 2015). Additionally, this Court's review is less deferential than a determination of whether a trial court's findings are supported by competent substantial evidence because that standard applies only to a trial court's application of the legal standard for newly discovered evidence following an evidentiary hearing. *Id*. at ___, 2015 W.L. 2095808, *21; *Melendez v. State*, 718 So. 2d 746, 747-48 (Fla. 1998); *Blanco v. State*, 702 So. 2d 1250, 1251 (Fla. 1997).

The trial court found that the evidence in the letter "could have been discovered prior to trial," (R. I. 118-19), but ignored that Saleh at trial specifically denied a number of facts to which Koo testified and that Saleh only admitted in his post-trial letter. The court relied on the jury's determination of Saleh's credibility, (R. I. 127), but ignored that the jury did not have the benefit of the statements in his letter that contradicted his trial testimony and corroborated Koo's.

Likewise, the First District erroneously found that the "evidence in the victim's letter was known to the parties, and as such, it did not qualify as newly discovered evidence." *Koo v. State*, 149 So. 3d 693, 695 (Fla. 1st DCA 2014). This Court and the Fourth District have held unequivocally to the contrary, that newly discovered evidence is presented when the defendant could not at trial elicit a recanting witness' subsequent statements that are consistent with the defendant's position at trial. *Archer v. State*, 934 So. 2d 1187, 1194 (Fla. 2006); *Kendrick v. State*, 708 So. 2d 1011, 1012 (Fla. 4th DCA 1998).[1]

As a result, claims based on recantations in these circumstances and with conflicting evidence as to the issue of guilt, the recantation evidence and the trial evidence should be weighed, usually requiring an evidentiary hearing. *See, e.g.*, *McLin v. State*, 827 So. 2d 948, 955-56 (Fla. 2002); *Roberts v. State*, 678 So. 2d 1232, 1235 (Fla. 1996); *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991). An evidentiary hearing is not required where, on its face, the recantation is "inherently incredible" or "obviously immaterial to the verdict." *McLin*, 827 So. 2d at 955-956 (citation and internal quotations omitted). An exception exists where the purported recantation "simply offers nothing new" because the source is one who

[1] The State's argument regarding the Petitioner having answered "no" to the trial court's question of whether anything should have been presented that had not been, Answer Brief at 21, is misplaced where the core issue is the inability to obtain corroboration from Saleh's testimony of facts pertinent to defenses of consent and necessity until after trial.

had given inconsistent or impeached statements all along and so is merely cumulative to evidence already presented. *Jones v. State*, 678 So. 2d 309, 312-13 (Fla. 1996). This case presents recantation evidence that is not "nothing new," "inherently incredible" or "obviously immaterial," or that Saleh's trial testimony was obviously immaterial. As a result, at a minimum, an evidentiary hearing is required to assess the credibility of the post-trial evidence and its weight along with the other evidence.

In this case, the trial court denied a new trial because it doubted Saleh's credibility generally, based on his trial testimony, but it did not find the assertions in the letter inherently incredible. R. I, 127 ("I don't place a lot of credibility in it [the letter] because I don't place a lot of credibility in Dr. Saleh, quite frankly."). See also, R. I, 98 ("quite skeptical" of the statements in the letter); R. I, 118 ("I don't find this letter particularly credible."). As expressed in the dissent below:

> This was reason enough to have held a hearing; if a key witness has serious credibility issues, that's strong evidence that he probably lied at trial, making it far better to err on the side of caution by holding a hearing to ferret out which version of reality is to be credited. Because serious doubt exists about Dr. Saleh's credibility, the integrity of Koo's conviction is seriously compromised, making a hearing that much more important.
>
> The jury could not have convicted Koo without Dr. Saleh's testimony, which it apparently found credible, at least as to some material respects now shrouded in doubt. Likewise, Dr. Saleh's recantation letter may be credible, at least as to the portions related to Koo's consent and necessity defenses, which are material to the verdict.

Koo v. State, 149 So. 3d at 698 (Makar, J., dissenting) (describing this as "an exceptionally close case"). The trial court and the First District failed to properly adhere to the standards for evaluating evidence of recantation for credibility and weight as set forth in *McLin*, among other decisions.

The authority on which the State relies to support its argument that summary denial of Petitioner's motion was appropriate is unpersuasive as it rests on two decisions that do not stand for the position it takes. Answer Brief at 32-33, *citing Moss v. State*, 943 So. 2d 946, 947-48 (Fla. 4th DCA 2006). The State cites *Moss* for the proposition that summary denial is flatly authorized if a recantation "is neither sworn nor particularized." *Moss*, 943 So. 2d at 948. *Moss* relied on *Robinson v. State*, 736 So. 2d 93 (Fla. 4th DCA 1999), and *Davidson v. State*, 638 So. 2d 626 (Fla. 3d DCA 1994), neither of which truly stand for that proposition. *Robinson* reversed a trial court's summary denial of a post-conviction motion supported by an affidavit of a witness that he had testified falsely at trial and remanded for an evidentiary hearing because the witness' affidavit was not "inherently incredible" and his trial testimony was not "obviously immaterial to the verdict." 736 So. 2d at 93. *Robinson* does not say that a sworn recantation affidavit is necessary to require an evidentiary hearing and in fact supports Petitioner's argument in this case.

Davidson likewise does not support the broad proposition argued by the State with its one-sentence opinion which reads in its entirety:

> As the purported recantation testimony is neither sworn nor particularized, and there is no showing how (if at all) the claimed recantation would have affected the trial, the trial court was entirely correct in denying the motion for postconviction relief as facially insufficient.

638 So. 2d 626. *Davidson* found that the facts asserted in the claimed recantation had not been shown to have been capable of having affected the trial, and so its statement regarding the recantation not being sworn is dicta, unnecessary to its decision and, when taken out of context as in *Moss*, is in incorrect statement of law.

Other cases have required evidentiary hearings where no affidavit from purportedly recanting witnesses had been presented. In *Murrah v. State*, 773 So. 2d 622 (Fla. 1st DCA 2000), the court reversed the summary denial of a postconviction motion based on unsworn videotaped recantations of the accusers' trial testimony. *Id*. at 623-24 ("summary denial is rarely appropriate if the trial court needs to assess the credibility of the new testimony") (cited with approval in *McLin*, 827 So. 2d at 955). Likewise, in *Davis v. State*, 31 So. 3d 277, 278-79 (Fla. 2nd DCA 2010), the court reversed a summary denial of postconviction relief and remanded for attachment of portions of the record conclusively refuting the claim or for an evidentiary hearing where the defendant's motion itself, with no

affidavit, letter or other evidence, merely alleged that a witness had verbally recanted his trial testimony to another person. An affidavit is not required for a recantation to require an evidentiary hearing to assess its credibility and to weigh the evidence for its potential effect on the trial or verdict.

The statements in Saleh's post-trial letter are material, that he had told Petitioner "to make sure I did not do something that I might regret" in his intense rage during his divorce case because he risked being sent "over the edge," relevant to Petitioner's necessity defense and state of mind. R. I, 84. The letter's statement that Petitioner could have taken jewelry or other more valuable items because "[h]e had keys to every dwelling" is material to Petitioner's defense of consent, as well as whether Petitioner had the intent required to be found guilty. R. I, 84. Saleh's use of the term "dwelling" is not dispositive but rather could be explored in an evidentiary hearing, which the trial court failed to conduct. Contrary to the State's argument, Answer Brief at 27, a non-lawyer such as Saleh should not be held to a legalistic definition of the term.

Saleh's letter contains more than arguably inadmissible statements of opinion. Rather, it includes material concessions and corroboration of conversations and emotions he shared with Petitioner, including that "I told Len to make sure I did not do something that I might regret" in the context of his intensely emotional divorce case. R. I, 84. He expressed awareness that his "irritation and

frustration could appear intense and frightening." R. I, 84. He stated, whether legally artfully or not, that Petitioner "had keys to every dwelling." R. I, 84. These statements, had Saleh been willing to make them, would have been admissible at trial, contradicted Saleh's trial testimony and corroborated key portions of Petitioner's testimony material to his defenses of consent and necessity, and to his intent and state of mind. As with *Archer* and *Kendrick*, the fact that Petitioner knew of the facts that Saleh denied at trial and admitted after trial cannot be held to bar a claim of newly discovered evidence. For the same reasons, Saleh's post-trial statements are not merely cumulative, needlessly repetitious or impeaching where they corroborate key aspects of Petitioner's trial testimony that he could not corroborate without Saleh's admissions.

Likewise, the assertions in the letter are amply sufficient in light of the trial record to require an evidentiary hearing.

> Applying *Stephens* [*v. State*, 829 So. 2d 945, 946 (Fla. 1st DCA 2002)], a hearing was required unless Dr. Saleh's letter was "inherently incredible or obviously immaterial to the verdict." It was neither….
>
> Under these circumstances, when the State's star witness recants a material portion of his testimony that goes to two key defenses in an exceptionally close case in which the jury expressed reservations (if not remorse) about its verdict – beseeching the trial judge to be lenient on the defendant – it was an abuse of discretion not to at least hold a hearing on the matter.

Koo, 149 So. 3d at 698-99 (Makar, J., dissenting).[2]

The State's reliance on *Herrera v. Collins*, 506 U.S. 390 (1993), is misplaced. Despite the skepticism with which recantations are viewed, the affidavits in *Herrera* were offered eight years after trial, "at the 11th hour," and after the alleged actual perpetrator had died, with no explanation of the delay or Herrera's guilty plea, heightening the skepticism in that case. *Id*. at 417-18. The Court criticized the affidavits as lacking "the benefit of cross-examination and an opportunity to make credibility determinations." *Id*. at 417. In this case, on the contrary, Saleh's letter came prior to sentencing and argument as to whether a new trial was warranted, and an evidentiary hearing would have subjected his post-trial assertions to cross-examination and credibility determinations. Accordingly, the decision below should be quashed.

[2] Of course, as the State argues, at times credibility or weight of written statements can be assessed facially. Answer Brief at 33 n. 8. In *Poff v. State*, 41 So. 3d 1062, 1064-65 (Fla. 3rd DCA 2010), on a successive postconviction motion, the court found that "generic assertions" were insufficient to show credibility or a probability of a different result. In *John v. State*, 98 So. 3d 1257, 1259-61 (Fla. 3rd DCA 2012), a postconviction motion asserting newly discovered evidence presented 16 years after trial could be rejected on its face in light of "the rather unique circumstances" supporting the trial court's extensive order. *See also McLin*, 827 So. 2d at 955-56 (inherently incredible or obviously immaterial); *Stephens*, 829 So. 2d at 946 (same).

II. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT KOO POSSESSED A FIREARM AS DEFINED BY STATUTE

The trial court should have granted the motion and renewed motion for judgment of acquittal for the charge of armed burglary. Contrary to the State's argument, the basis for the motion was sufficiently specific to preserve the issue for review. Furthermore, the State cites no authority in support of its argument that one of Petitioner's theories of defense, necessity, relieves the prosecution of its constitutional burden of proving each element of a charged criminal offense beyond a reasonable doubt.

The State notes that the motion as to this issue asserted that the prosecution "didn't actually prove that this was a firearm which was taken." Answer Brief at 38, citing, R. III, 220. What constitutes a "firearm" is defined by statute, §790.001, Fla. Stat. (2011). See Initial Brief on the Merits at 19-20. The State presented no evidence whatsoever addressing whether any "gun" at issue met the statutory definition. Detective Shacklett's testimony that a .22 rifle is capable of killing a person is not based on his knowledge of the purported .22 caliber rifle in this case, which he never even saw. The only purported "gun" in evidence, the supposed AK-47, was never the subject of any testimony about whether it in fact possessed the statutory characteristics of a "firearm."

The issue was presented with sufficient specificity to preserve this issue, contrary to the State's argument. *Corona v. State*, 64 So. 3d 1232 (Fla. 2011), is

instructive on this point. In *Corona*, the question was whether what the Fifth District had described as an inadequate "generic" objection to hearsay testimony violating the defendant's "confrontation" rights was sufficiently specific to preserve a claim under *Crawford v. Washington*, 541 U.S. 36 (2004). *Corona*, 64 So. 3d at 1237-38. This Court found that the objection was sufficiently specific to preserve the issue, as sufficient specificity to inform the trial court of an asserted error does not require "that a defendant intone special 'magic words.'" *Id*. at 1242 (citations omitted).

The basis for the motion for judgment of acquittal below, that the evidence was insufficient to prove a "firearm," was sufficiently specific to place the trial court on notice of this issue. The State identifies no basis for the trial court not to have been sufficiently apprised given the stated ground for the motion. The trial court proceeded to instruct the jury, pursuant to the definitional statute in pertinent part, "A firearm is legally defined as any weapon which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive…." R. IV, 379-80. The trial court knew that, to constitute a "firearm," any weapon at issue must satisfy the statutory definition of a "firearm." Accordingly, the legal basis for the motion was sufficiently specific to be preserved as the court was on notice of the controlling and applicable statutory definition.

"The prosecution bears the burden of proving all elements of the offense charged." *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993). In this case, the prosecution presented no evidence whatsoever to satisfy its burden under the Fifth Amendment to the United States Constitution, *id*., of proving the element of becoming armed during the commission of a burglary that any "firearm," as statutorily defined, was involved in this case.

A conviction will be upheld if supported by competent, substantial evidence from which a rational trier of fact could find proof of each element beyond a reasonable doubt. *Delgado v. State*, 71 So. 3d 54, 65-66 (Fla. 2011). However, trial courts retain a role of ensuring that a charged offense not be submitted to a jury if the evidence is insufficient as to one or more elements. "Under this standard, the State 'is required to prove each and every element of the offense charged beyond a reasonable doubt, and when the [State] fails to meet this burden, the case should not be submitted to the jury, and a judgment of acquittal should be granted." *Id*. at 66 (quoting *Baugh v. State*, 961 So. 2d 198, 204 (Fla. 2007), in turn quoting *Williams v. State*, 560 So. 2d 1304, 1306 (Fla. 1st DCA 1990)).

In *Delgado*, the question presented was the sufficiency of the evidence of whether Delgado knew of the presence of a child in a car prior at the time he burglarized and stole the car in order to be convicted of the offense of kidnapping. *Id*. at 60-61. The Court found that the theory on which the Third District relied to

affirm the conviction constituted an impermissible modification of the statutory elements of the state kidnapping statute. *Id*. at 65. Delgado's argument that the evidence did not show he knew of the child's presence when he stole the car was supported by the record despite the State's argument that the evidence regarding the element of knowledge was sufficient to constitute competent, substantial evidence in order for the case to be submitted to the jury. *Id*. at 67.

The facts established that the car had been burglarized and stolen with a child in the back seat before being found abandoned within twenty to thirty minutes, damaged and with an exhausted crying child inside. *Id*. at 66-67. With that evidence undisputed, the Court found that the State did not introduce any evidence establishing when Delgado became aware of the child's presence. *Id*. at 67. The Court accepted the conclusion that Delgado became aware of the child's presence at some point, at least when ransacking the car, but found that "the State did not introduce competent, substantial evidence demonstrating that Delgado became aware of the child's presence when he stole the vehicle." *Id*. As a result, the Court held that the trial court should have granted the motion for judgment of acquittal on the kidnapping count and remanded for the conviction on that count to be vacated. *Id*. at 67-68.

The issue raised in this case is different than that in *Dale v. State*, 703 So. 2d 1045 (Fla. 1997), cited by the State. In that case, the issue was whether

"deadliness" of a BB gun is a jury question or whether a BB gun is never a deadly weapon as a matter of law. *Id*. at 1047. Also in that case, "Investigator Corder showed the jury in detain how the gun operated." *Id*. Similarly, in *Santiago v. State*, 900 So. 2d 710 (Fla. 3rd DCA 2005), the issue was whether the evidence of all the circumstances, including how the defendant actually threateningly used a BB gun toward the victim, was sufficient to show that the weapon was "dangerous." *Id*. at 712.

The issue is different in this case than those presented in *Dale* and *Santiago*. In this case, the detective did not testify at all about the manner in which any purported gun of Saleh's was designed or operated, unlike in *Dale*. Similarly, in *Santiago*, the issue was whether the evidence of the threatening use of the BB gun was sufficient to allow the jury to determine if it was "dangerous," unlike this case in which no evidence was presented of the actual characteristics of any of Saleh's actual purported "guns." Detective Shacklett had never seen, much less inspected, the .22 rifle that was the only purported gun he described, so he was not competent to render the testimony that it was an actual firearm. He never described any characteristics of the supposed "AK-47" presented in evidence. Petitioner raised a different ground for his motion for judgment of acquittal than those raised in any of the cases on which the State relies. The evidence was insufficient to warrant the

charge of becoming armed during a burglary being submitted to the jury, and that conviction accordingly should be reversed.

CONCLUSION

For the foregoing reasons and those in the Initial Brief on the Merits as to Argument I, the First District's decision should be quashed and the case remanded for a new trial or for an evidentiary hearing on the amended motion for new trial. For the reasons in Petitioner's briefs as to Argument II, the judgment should be reversed and the case remanded for resentencing for unarmed burglary of an unoccupied structure in the event a new trial is not ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via email, on this 18th day of June 2015 to Justin D. Chapman, Esquire, Assistant Attorney General, at justin.chapman@myfloridalegal.com and crimapptlh@myfloridalegal.com.

/s/ *D. Gray Thomas*
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ *D. Gray Thomas*
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